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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 17, 2000

Magalie Roman Salas
Secretary, Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: CS Docket No. 00-30 (en banc hearing)

Dear Ms. Salas:

I represent the City of Daytona Beach, Florida, and am submitting the enclosed statement for inclusion in the record for the FCC's July 27, 2000, *en banc* hearing with respect to the joint applications of America Online, Inc. and Time Warner, Inc.'s for approval of the transfer of FCC licenses and authorizations to a new entity, AOL Time Warner (CS Docket No. 00-30).

Sincerely,



Cynthia M. Pols

enclosure

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STATEMENT OF RICHARD F. QUIGLEY
ASSISTANT CITY MANAGER, DAYTONA BEACH, FLORIDA

submitted to
FEDERAL COMMUNICATIONS COMMISSION
in connection with its en banc hearing on
AMERICA ONLINE, INC. AND TIME WARNER, INC.
APPLICATIONS FOR TRANSFER OF CONTROL

CS Docket no. 00-30

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My name is Richard Quigley, and I am the Assistant City Manager for the City of Daytona Beach, Florida. I am submitting this statement for the record on behalf of the City of Daytona Beach, Florida, as to the impact of the AOL-Time Warner merger on consumers and cities. Time Warner currently has tremendous market power in the Daytona Beach area and hundreds of other communities around the nation. The FCC should take action to ensure that that power is not extended into the evolving markets of the future via the merger of AOL and Time Warner. Specifically, it is essential that the FCC establish strict structural and regulatory requirements as a condition of approving the merger of AOL and Time Warner. These structural and regulatory requirements should prevent future abuses of market power by AOL-Time Warner, provide local governments with the necessary regulatory authority, and provide access to the AOL-Time Warner cable systems for competing providers of information, programming, Internet service, and other services.

I would like to begin by providing background information on Time Warner's operations in the Daytona Beach area. Time Warner, the nation's second largest cable company, arrived in our community in July of 1999 amid much promise of improvements in service. It assumed control of the Daytona Beach franchise and the franchises for a number of neighboring jurisdictions in Volusia County in connection with a swap of cable systems between Time Warner and AT&T.

Time Warner assumed ownership of the Daytona Beach franchise and the franchises of several other nearby cities after Daytona Beach and a consortium of area cities (Daytona Beach Shores, New Smyrna Beach, Port Orange, and South Daytona) had begun franchise renewal proceedings with the prior cable company, AT&T. The renewal process was critical for all five communities because our

franchises are old franchises that were generally granted in the mid-1960s and have not been updated to reflect developments in technology and law. For these and other reasons, the cable system serving Daytona Beach and nearby communities is an outdated 450 MHZ one-way system. It provides plain vanilla cable service and does not provide access to Internet and other advanced services. It also has a history of signal quality and reliability problems and customer service problems.

1999 TRANSFER TO TIME WARNER

At the time of the transfer to Time Warner in 1999, Daytona Beach and the other cities in our consortium were interested in completing the renewal process as quickly possible in order to ensure an upgrade of the system and to provide other improvements in service. In exchange for a commitment by Time Warner to complete the renewal process on an expedited basis, Daytona Beach approved the transfer of the franchise from AT&T to Time Warner in June of 1999. In approving the proposed transfer, Daytona Beach and other consortium members effectively relinquished a key element of authority in the franchise renewal process. Specifically, approval of the transfer meant that, under federal law, the cities could not hold Time Warner legally responsible in the franchise renewal process for the prior company's failure to comply with the franchise or for its performance problems.

In exchange for the city's approval of the transfer (and the resulting loss of the city's right to pursue franchise compliance and past performance problems in the renewal process), Time Warner made various commitments to the city (and three of the other cities in the consortium) in a transfer consent agreement. For the City of Daytona Beach and the other cities, the benefits secured by that agreement have turned out to be illusory. This raises fundamental questions with respect to the wisdom of the FCC's relying on voluntary agreements between AOL-Time Warner and other Internet service and content providers instead of structural and regulatory safeguards to ensure open access and prevent other anticompetitive practices.

TIME WARNER'S FAILURE TO COMPLY WITH THE TRANSFER AGREEMENT

The agreement between Time Warner and Daytona Beach and each of the other cities required Time Warner to begin "good faith negotiations" within 30 days of the transfer of the franchise to Time Warner and to "make every effort to reach agreement on the terms of a renewal within 90 days of commencement of such negotiations." In practical terms, this meant that negotiations were supposed to begin on about August 1, 1999. In fact, negotiations did not actually begin until October 4, 1999, resulting in January 4, 2000, becoming the target date for completion of the renewal process under the terms of the transfer consent agreement. Although the two sides met a number of times and exchanged documents in the fall of 1999, it was apparent to the cities that Time Warner had no real interest in complying with the deadline specified in the transfer consent agreement. Time Warner stonewalled the cities on virtually every issue, essentially offering nothing of substance on the important issues and asserting FCC preemption as the basis for its refusal to agree to basic franchise requirements in numerous areas. Today, some seven months after the January 4, 2000, deadline, the two sides continue to meet on a regular basis but remain far apart on many of the important issues and the cable system has yet to be upgraded or significant improvements in service made more than a year after the transfer to Time Warner.

The transfer consent agreement included several substantive requirements in addition to the requirement for an expedited renewal process. First, Time Warner made a commitment "to fully upgrade the system to state-of-the-art standards" in the franchise renewal. The cities have encountered great difficulties in securing commitments from Time Warner to upgrade the system to true state-of-the-art standards and to ensure periodic upgrades of the system in the future to remain current with future developments in technology. Second, Time Warner agreed, in the transfer consent agreement, to "assume full responsibility for correcting any deficiencies in performance." In fact, since Time Warner assumed control of the system, customer complaints have increased significantly in a wide range of areas. And third, Time Warner agreed to "respond to cable-related community needs with regard to public and community services and customer service consistent with the Cable Act" in the franchise renewal. Time Warner has consistently refused to comply with this requirement

of the transfer consent agreement during the renewal negotiations. Among other things, Time Warner has refused to provide any access channel capacity for any of the five institutions of higher education in our area, including Daytona Beach Community College, a mainstay of the community. Even more surprising, Time Warner has consistently refused to provide the cities with access to emergency alert service despite the fact that serious emergency situations in our area are all too common (*e.g.*, hurricanes, the uncontrollable fires of 1999).

ANTI-CONSUMER ACTIONS BY TIME WARNER

Daytona Beach and cities around the country are already at a distinct disadvantage in dealing with Time Warner. The rules established by the FCC and Congress have created a complex legal environment that favors the cable industry and does not provide cities with the simple tools needed to respond to the legitimate grievances of community residents with regard to such basic matters as excessive prices, poor choice in programming, and unresponsive customer service. In most areas of importance—"open access" for Internet service providers, prices, programming, technical standards, franchise renewals, transfer rules, and support for access, for example—the FCC and Congress have established a tangle of unclear and inconsistent rules that impose unreasonable restrictions on local authority. Yet, from the community's perspective, local governments, as the franchising authority, are the responsible party and are expected to take action to remedy the many problems that subscribers encounter with Time Warner and other cable operators.

Soon after assuming control of the cable system in our community, Time Warner began to implement a plan that would ultimately require all pay-per-view and premium service customers in Daytona Beach to rent converter boxes from the cable company at a charge of about \$5 per month for each box. For many subscribers, this change resulted in a substantial increase in monthly charges—\$15 per month for homes with three television sets, for example—and no perceived improvement in service. Time Warner accomplished this by removing the "traps" that had been used for many years by prior cable operators to regulate access to premium channels and pay-per-view services and requiring customers to rent addressable converter boxes in order to continue to receive

the service.

In effect, Time Warner provided no new service of any real value to customers but found a way to significantly increase rates for a sizable group of customers (*i.e.*, all analog customers who subscribed to premium channels and pay-per-view services). We are aware that the FCC has adopted “navigation device” rules that are designed to eventually open up the converter box market to competition by requiring that such equipment be compatible and interoperable with various distribution systems. Perhaps some day this provision will have a practical effect and will provide some relief for community residents by reducing financial incentives for the cable operator to require customers to rent expensive equipment from the cable operator. But in the meantime these rules are irrelevant to the day-to-day experience of residents of Daytona Beach. It is our understanding that these rules will not become fully effective for five or six years and could be further delayed by other challenges by the cable industry. (The cable industry has effectively thwarted development and implementation in various ways of these rules and most other FCC proposals designed to ensure compatibility and interoperability between cable system technology and other consumer electronic equipment (*e.g.*, digital television sets and cable systems).)

Another step taken by Time Warner soon after assuming control of the system was to remove the on-screen program guide for all customers who did not rent an addressable converter box or subscribe to digital service. This meant that a large number of subscribers no longer have any access whatsoever to an on-screen service that provides a channel-by-channel listing of the schedule for programming delivered over the cable system. This is a basic service that has been provided for many years in our community and is a standard service provided by virtually all other cable operators. Yet in our community, our residents can obtain access to this service only if they are willing to pay a monthly fee for an addressable converter box or to subscribe to a package of high-priced digital services.

Both of the actions—forcing subscribers to rent converter boxes and removing the on-screen guide as a standard service—are actions that Time Warner could take only because of its market power in

our community and because of unreasonable federal restrictions on local authority. Our residents feel that they are powerless to do anything about these market practices, and the City is also powerless to intervene in a meaningful way because of the restrictions of federal law.

RECOMMENDATIONS

In January of this year, we learned of the planned merger of Time Warner and AOL into a single company that would combine the power of the world's largest Internet service provider, the second largest cable company, and the largest entertainment company into a single entity. This mega-company is expected to provide a wide range of communications services and to play a central role in shaping and controlling emerging markets for interactive television, Internet-based video services, video-on-demand, and many other new services. In communities like ours, this new company would provide the broadband pipeline for cable, high-speed Internet, and other services while also controlling the content and delivery of much of the information and programming distributed over this vital pipeline to residents of our community. In other words, the AOL-Time Warner merger will result in extraordinary control of the flow of information in any community served by a Time Warner system if strict conditions are not imposed on the merged entity's operations.

Under current rules, it has been easy for Time Warner to take advantage of customers in the Daytona Beach area on such basic matters as converter boxes, program guides, and similar items. Under current law, the city is, in effect, powerless to stop anticompetitive behavior of this sort or to remedy many of the service problems facing consumers in our community. Similarly, Time Warner appears to believe that it is free to ignore with relative impunity the basic contractual responsibilities established in the transfer consent agreement.

In view of the foregoing and the many other issues that have been identified by other parties to this proceeding, it is clear that the FCC should, at a minimum, impose strict requirements that preclude the seamless merging of control of both the broadband pipeline of the future and the content delivered over that pipeline. If the FCC fails to act decisively and unambiguously, then the merged

entity, AOL-Time Warner, will be in a position to exercise extraordinary control over much of the information that is delivered to homes in Daytona Beach and other cities served by Time Warner, with the resulting ability to engage in predatory pricing practices in various areas and restrict the free flow of information in the community.

It is equally clear that the FCC, in connection with establishing conditions for approval of the proposed merger and developing ground rules for the merged company's operations, should give Daytona Beach and other cities served by Time Warner the enhanced regulatory authority needed to ensure responsible and fair behavior by the proposed corporate giant in our community and others. This could include, for example, the ability to require that the cable system be designed and built to eliminate the need for the use of converter boxes and other equipment that are available only from AOL-Time Warner. This could also include the authority to ensure that sufficient channel capacity and system facilities are set aside for access purposes and City use and that financial resources are provided to equip and operate these channels. Finally, it could include the authority to ensure that the cable system is operated on a truly open basis and will provide our residents with access to the service offerings of third party providers at competitive prices. These are just a few examples of areas in which FCC action is warranted in connection with approving the proposed merger. There are many other areas in which federal rules effectively prevent local governments from protecting community residents from anticompetitive actions that could be committed by an entity which will have unprecedented market power in the delivery of programming and information.